RECENT DECISIONS.

KARL W. KIRCHWEY, *Editor-in-Charge.*

ADMIRALTY—GENERAL AVERAGE—CONCEALED DEFECT IN CARGO.—The schooner was chartered to carry a cargo of tankage, the general character of which both the shipper and shipowner knew, but neither knew of its faulty manufacture. Water, used in extinguishing the fire resulting from spontaneous combustion in a number of the bags caused by this concealed defect, damaged others. *Held,* the shipper or his insurer could recover from the vessel its contribution in general average. *The Wm. J. Quillan* (C. C. A., 2nd C. 1910) 180 Fed. 681.

In order to maintain an action in general average contribution there must have been a voluntary and successful sacrifice of a part of the maritime adventure for the benefit of the whole by the order of the master. *Ralli* v. *Troop* (1895) 157 U. S. 386. Further the sacrifice must not have been caused by the fault of the claimant. *The Irrawaddy* (1898) 171 U. S. 187. Such a fault in order to be a defense must be an actionable wrong, *The Ettrick* (1881) L. R. 6 P. D. 127, for which the claimant would be liable in damages. *Greenshields, Cowie & Co.* v. *Stephens & Sons* L. R. [1908] 1 K. B. 51; [1908] A. C. 431. By the better view, since a common carrier is bound to receive goods offered for shipment, the law implies that the shipper warrants the goods not to be dangerous, although unaware of their hazardous nature, 11 COLUMBIA LAW REVIEW 80, a rule which applies equally to a general ship. *Brass* v. *Maitland* (1856) 6 E. & B. 481; *cf. Acatos* v. *Burns* (1878) 47 L. J. Ex. 566; Carver, Carriage by Sea 375. It is submitted, however, that this doctrine is not properly applicable to a chartered vessel. *Contra, Pierce* v. *Winsor* (1861) 2 Sprague 35. As such a vessel is not a common carrier, *Lamb* v. *Parkman* (1857) 1 Sprague 343, it is not subject to the carrier's absolute obligation to receive goods, Angell, Carriers 89, nor to the same risks and liabilities. See *Gage* v. *Tirrell* (Mass. 1864) 9 Allen 299, 309. Since therefore the parties in such a case contract on equal terms, the reason for such extraordinary protection does not exist. Although this distinction is not raised in the principal case, on this basis it can be justified in rejecting the doctrine of *Pierce* v. *Winsor supra* and permitting the plaintiff to recover.

ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION—LAPPAGE OF GRANTS.—In trespass both the plaintiff and the defendant claimed title to an interlock made by their respective deeds, wholly by constructive adverse possession against the heirs of an elder grantee. Although the defendant's deed was the older, the plaintiff alone had actually occupied some other portion of the elder grant. *Held,* the plaintiff had title to the lappage. *Simmons* v. *Defiance Box Co.* (N. C. 1910) 69 S. E. 146.

It follows from the rule that adverse possession must be open and notorious that where neither party is in actual possession of the lappage, the seisin of the senior grantee remains unimpaired by the mere adverse claim, whether he be in possession of some part of his land, *Ilsley* v. *Wilson* (1895) 42 W. Va. 757, or of none at all. *Foster* v. *Grizzle* (Tenn. 1860) 1 Cold. 530; *Parker* v. *Barnes* (1886) 65 Tex.

605. This seisin or constructive possession may be set up as a defense by a stranger to the superior title when sued by the junior claimant in ejectment, *Hole* v. *Rittenhouse* (1855) 25 Pa. St. 491, or even in trespass. *McLean* v. *Murchison* (N. C. 1860) 8 Jones 38. Since, moreover, the seisin of the rightful owner in possession yields only to the actual disseisin of an adverse claimant, even actual possession of part of the lappage by the junior grantee does not, where the senior grantee actually occupies part of his land, give him constructive possession of the whole. *Anderson* v. *Jackson* (1887) 69 Tex. 346; *Hunnicott* v. *Peyton* (1880) 102 U. S. 333. The contrary result has erroneously been reached where the only possession of the senior grantee was outside the lappage. *McLean* v. *Smith* (1890) 106 N. C. 172. As to wholly unoccupied land, however, the principle of constructive adverse possession is firmly established, so that, in such a case, a junior grantee who has actually settled on part of the lappage may clearly acquire title to the interlock by lapse of time. *Zundel* v. *Baldwin* (1896) 114 Ala. 328. Such was the position of the plaintiff in the principal case. The defendant on the contrary, having never entered upon the land in dispute, could not acquire title.

CARRIERS—DANGEROUS SHIPMENT—CONSIGNOR'S LIABILITY.—The plaintiff's husband, a common carrier, was killed by gases from a chemical delivered to him by the defendants without revealing its name but in ignorance of its dangerous character. *Held,* the defendants were liable for the breach of implied warranty of the safety of the shipment. *Bamfield* v. *Goole & Sheffield Co.* (1910) 79 L. J. K. B. D. 1070.

It was early recognized that a shipper knowing the dangerous character of the article offered for transportation must give this information to the carrier, *Williams* v. *East India Co.* (1802) 3 East 192, in addition to disclosing its name, *Hutchinson* v. *Guion* (1858) 28 L. J. C. P. (N. S.) 63, and that a failure to do so was actionable. *Farrant* v. *Barnes* (1862) 11 C. B. (N. S.) 553; *Barney* v. *Burstenbinder* (N. Y. 1872) 64 Barb. 212. The conflict arises where the sender is ignorant of the hazardous nature of the commodity. It would seem, however, that this knowledge is important only when he is sued for deceit, *Brass* v. *Maitland* (1856) 6 E. & B. 481; *Pierce* v. *Winsor* (1861) 2 Sprague 35, and that otherwise only the carrier's knowledge, actual or constructive, is a defense. See *Acatos* v. *Burns* (1878) 47 L. J. Ex. 566. The principles of justice and convenience on which the duty of the consignor, cognizant of the danger of the shipment, is based, *Railroad* v. *Shanly* (1871) 107 Mass. 568, seem equally applicable where there is no such knowledge. The shipper has usually better means of discovery; his act is always equally perilous to life and property; and to imply a warranty of safety in the latter case is not unparalleled. See *Brown* v. *Edington* (1841) 10 L. J. C. P. (N. S.) 66. The carrier, bound to transport indiscriminately packages delivered for carriage, and generally without the right to demand the disclosure of their contents, *Crouch* v. *Railway Co.* (1854) 23 L. J. C. P. (N. S.) 73; *The Nitro-Glycerine Case* (1872) 15 Wall. 524, is thrown wholly upon the shipper's mercy, and to hold that a shipper warrants the safety of the consignment is a proper application of the principle that one who calls upon another to perform a legal duty impliedly warrants his right to make that demand. See *Bank of England* v. *Cutler* L. R. [1908] 2 K. B. 208. The principal case, therefore, only establishes more firmly a doctrine that is salutary and sound.

CHOSES IN ACTION—ASSIGNMENTS—PRIORITY OF SUCCESSIVE ASSIGNEES.—The assignee of part of the salary due an employee of the defendant railway, which never assented to the assignment, sued the railway, joining subsequent innocent purchasers of the whole claim. By statute assignees of an entire debt obtained legal title. *Held,* the subsequent assignees had the better right. *King Bros. & Co.* v. *Central of Georgia Ry. Co.* (Ga. 1910) 69 S. E. 113.

In the absence of statute, priority of right among successive assignees of the same claim is determined by the time either of notice to the obligor, *Dearle* v. *Hall* (1823) 3 Russ. 1, or of the assignments themselves. *Fairbanks* v. *Sargent* (1887) 104 N. Y. 108. Since a total assignment creates in the assignee rights against the debtor and thus leaves the creditor with nothing transferable, *Muir* v. *Schenck* (N. Y. 1842) 3 Hill 228, notice is properly essential only to fix the debtor's obligation, and therefore, in the absence of circumstances to raise an estoppel, the latter, which is the general American test, *contra, Methven* v. *Power Co.* (1895) 66 Fed. 113, is the true criterion. Both doctrines, however, are applicable only to equal equities, *Royal* v. *Miller* (Ky. 1835) 3 Dana 55; *Judson* v. *Corcoran* (1854) 17 How. 612; *Watch Case Co.* v. *Dougherty* (1900) 62 Ohio St. 589, and it therefore seems that on sound theory the result of the principal case should be reached without statute, for although the assignee of the whole debt acquires no legal title at common law, 3 COLUMBIA LAW REVIEW 581, he has an interest enforceable at law, *Hammond* v. *Messenger* (1838) 9 Simon 327, and accordingly superior to the right of an assignee of a part. See *Dodds* v. *Hills* (1865) 2 H. & M. 424; 1 Harv. L. Rev. 5-7. However, under statutes which expressly, 1 Stimson, Amer. Stat. Law § 4031, or by implication from provisions regulating procedure, *Knadler* v. *Sharp* (1873) 36 Iowa 252; *cf. McDonald* v. *Kneeland* (1861) 5 Minn. 352, vest the recipient of a total assignment with legal title, it is undoubtedly correct to hold that the innocent purchaser of the whole must prevail over a prior assignee of a part, *Downer* v. *Bank* (1866) 39 Vt. 25; *Carlisle* v. *Jumper* (1883) 81 Ky. 282, since the latter without the debtor's consent has but an equitable interest. *Exchange Bank* v. *McLoon* (1882) 73 Me. 498; see *Jones* v. *Humphreys* L. R. [1902] 1 K. B. 10.

CONSTITUTIONAL LAW—COMMERCE WITH INDIAN TRIBES—FEDERAL POLICE POWER.—In mandamus proceedings to compel the transportation of liquor into that part of Oklahoma formerly known as the Indian Territory, the defendant relied on the act of Congress of 1897 prohibiting the introduction of liquor into Indian country. *Held,* the federal statute was repealed as to Indian Territory by the admission of Oklahoma. *U. S.* v. *U. S. Express Co.* (D. C., W. D. Ark. 1910) 180 Fed. 1006.

As long as the Indians retained their tribal organization, Congress regulated the traffic in intoxicating liquors under the Commerce Clause, *U. S.* v. *Holliday* (1865) 3 Wall. 408, or by virtue of a federal police power acquired by treaty over the Indian lands. *U. S.* v. *43 Gallons of Whiskey* (1876) 93 U. S. 188; and see *Cherokee Nation* v. *Georgia* (1831) 5 Pet. 1. While moreover Congress may reserve a general police jurisdiction over Indian lands even when a new state is admitted, *U. S.* v. *Celestine* (1909) 215 U. S. 278, the right to control the sale of liquor to tribal Indians in such a case continues by virtue

of the Commerce Clause even in the absence of the federal police jurisdiction. *U. S.* v. *Holliday supra.* When, however, an Indian becomes a citizen of the United States and the land allotted to him is made subject to the jurisdiction of a newly admitted state, Congress clearly loses its police power. *Matter of Heff* (1905) 197 U. S. 488. That Congress is in such a case also entirely divested of its power to deal with the Indians under the Commerce Clause has never been definitely asserted. *Dick* v. *U. S.* (1908) 208 U. S. 340. The undoubted trend of the decisions is, however, to deny that, in the absence of express or implied reservation, Congress retains any such control. *Matter of Heff supra; U. S.* v. *Hall* (1909) 171 Fed. 214. The principal case is therefore in accord with the decided cases.

CONSTITUTIONAL LAW—DUE PROCESS—INSANITY AS DEFENCE TO CRIME.—The defendant, convicted of assault in the first degree, attacked the validity of the statute under which he was convicted, which abolished the defence of insanity, excluded evidence thereof, and empowered the court in its discretion to commit a convicted defendant to an asylum or other specified place if believed to be insane. *Held,* the statute was unconstitutional. *State* v. *Strasburg* (Wash. 1910) 110 Pac. 1020.

An attempt to change the criminal law obviously comes under the head of the police power. Such a statute, though almost of necessity involving an interference with personal liberty, does not conflict with the Fourteenth Amendment if it be a valid exercise of that power. *Lochner* v. *New York* (1904) 198 U. S. 45, 53. That it overturns an established rule of the common law will not invalidate it. *Munn* v. *Illinois* (1876) 94 U. S. 113, 134; *Hurtado* v. *California* (1883) 110 U. S. 516, 531. Thus it seems the common law defence of insanity, which legally amounts simply to incapacity to entertain criminal intent, may be abolished for the public good in the exercise of the police power, and a new crime created; for criminal intent is clearly not an essential element of crime. See *State* v. *Kellar* (1902) 8 Ida. 699; *Gardner* v. *People* (1875) 62 N. Y. 299. The courts moreover cannot question the justice or expediency of such an act. *Munn* v. *Illinois supra,* 134; Cooley, Const. Lim. 236. Further, the present statute fully satisfies the requirement of equal protection of the laws, for the classification and the remedy are precisely coextensive with the evil to be corrected. Cooley, Const. Lim. 556; see *Connoly* v. *Pipe Line Co.* (1901) 184 U. S. 540, 558-564. But the latter part of the statute, lacking all provision for notice or a hearing prior to commitment, or for discharge thereafter, would seem to be clearly beyond the police power, and therefore to violate the guarantee of due process of law; *In re Lambert* (1901) 134 Cal. 626; Freund, Police Power §§ 253-255; and the statute not being separable, Cooley, Const. Lim. 246, 247, the whole must fall. See *Connoly* v. *Pipe Line Co. supra,* 564.

CONTEMPT—VIOLATION OF INJUNCTION—LIABILITY OF AGENT.—An injunction issued restraining the defendant in the suit from the sale of certain shares of stock. Before the defendant knew of the restraining order, his attorney, acting under his authority, but in his absence, sold the shares. *Held,* the act of attorney, if done with knowledge of the injunction, was in contempt of court. *In re Rice* (C. C., M. D. Ala. N. D. 1910) 181 Fed. 217.

A person not a party to the suit in which an injunction issues nor

included within its terms is not liable for civil contempt. *Iveson* v. *Harris* (1802) 7 Ves. Jr. 251; *Garrigan v. U. S.* (1908) 163 Fed. 16. Where however the terms of the restraining order include classes of persons not parties to the suit, dissensions arise. In England the liability for a technical violation is apparently limited to parties to the suit. *Lord Wellesley* v. *Earl of Mornington* (1848) 11 Beav. 180; *Seaward* v. *Patterson* L. R. [1897] 1 Ch. 545. In this country such liability has been extended to a party's agents thus included who have knowledge of the order. *Aldinger* v. *Pugh* (1890) 10 N. Y. Supp. 684. Some courts have further extended it to include those aiding and abetting the parties restrained, *O'Brien* v. *People* (Ill. 1906) 75 N. E. 108; *contra, In re Reese* (1901) 107 Fed. 942, a doctrine which some cases justify on the theory that the parties before the court adequately represent the class named. *American Steel & Wire Co.* v. *Wire Drawer's Union* (1898) 90 Fed. 598, 608; but see 3 Street, Fed. Eq. Pr. § 2457. On principle, since an injunction operates strictly *in personam,* only a party to the injunction should be bound by it and thus guilty of a breach. Moreover this extension seems unnecessary, for if a person, acting in privity with the party restrained either as agent, *Lord Wellesley* v. *Earl of Mornington* (1848) 11 Beav. 181, attorney, *Lewis* v. *Morgan and Lewis* (1818) 5 Price 518, or confederate, *Avery* v. *Andrews* (1882) 51 L. J. Ch. Div. 414, knowingly contravenes the order or aids in its violation, *U. S.* v. *Agler* (1894) 62 Fed. 824, even though not included within its terms, *Huttig Sash & Door Co.* v. *Fuelle* (1906) 143 Fed. 363, he is deemed to thwart the administration of justice and is held guilty of criminal contempt. *In re Lennon* (1897) 166 U. S. 548; *cf. Chisolm* v. *Caines et al.* (1903) 121 Fed. 397. The principal case in basing its conclusion upon the latter doctrine adopts the sound view.

CONTRACTS—PERFORMANCE—IMPOSSIBILITY AS EXCUSE FOR BREACH.—The plaintiff contracted to build a canal, agreeing that he relied solely on his own investigation of conditions. During the work it appeared that owing to the nature of the soil, performance was impossible. The plaintiff refused to continue and sued for work done. The defendant set up the plaintiff's breach. *Held,* the plaintiff was excused from performance by the absence of conditions necessary thereto. *Kinzer Construction Co.* v. *State* (1910) 125 N. Y. Supp. 48.

The established rule that impossibility does not excuse performance is subject to well recognized exceptions where the impossibility is due to a change in the law, *Jones* v. *Judd* (1850) 4 N. Y. 411, to the death or illness of one whose services were contracted for, *Spalding* v. *Rosa* (1877) 71 N. Y. 40, or to the destruction of the subject-matter. *Dexter* v. *Norton* (1871) 47 N. Y. 62; *Howell* v. *Copeland* (1876) L. R. 1 Q. B. 258. A fourth exception has been recognized recently where the impossibility is due to a change in circumstances the continuance of which is essential to performance. *Dolan* v. *Rodgers* (1896) 149 N. Y. 489. These exceptions proceed on the theory that a condition will be implied where it is a term which the parties actually had in mind or which they would have intended had the contingency occurred to them. *Lorillard* v. *Clyde* (1894) 142 N. Y. 456. Obviously then where the parties have in mind an absolute obligation, to imply a condition does violence to their expressed intention. Consequently a condition will only be implied in the event of some subsequent change

of circumstances and not where pre-existing conditions are later discovered; for, the promise being in terms absolute, the inference is that the parties contracted with reference to existing conditions whether known or not. *Finney* v. *Bennett* (1906) 97 N. Y. Supp. 291. This presumption is stronger where, as in the principal case, the promisor expressly bargains on the basis of his own investigations, a circumstance which even in equity bars relief for mistake of fact. *Sample* v. *Bridgforth* (1894) 72 Miss. 293. The principal case seems to imply a condition not within the contemplation of the parties.

DAMAGES — AVOIDABLE CONSEQUENCES — CARRIERS. — The defendant's motorman stopped his car, the last one that night, 75 yards past the station where the plaintiff had been signalling it. The plaintiff refused to walk the distance, though the ground was free from obstruction. After waiting a moment, the car proceeded. The plaintiff walked home, a distance of four miles, and was unfit for work the next day. *Held,* judgment for the plaintiff for $100 must be affirmed. *Christian* v. *Augusta Ry. Co.* (S. C. 1910) 69 S. E. 17.

The doctrines of avoidable consequences and contributory negligence are quite distinct, the latter defeating the action, while the former cannot be applied until a cause of action for at least nominal damages has arisen. This rule proceeds on the theory, not that it is the plaintiff's duty to reduce damages, there being no corresponding right in the defendant, but that the plaintiff is not legally damaged by consequences which he may avoid by acting with ordinary prudence; his own conduct and not that of the defendant being deemed the proximate cause of his injury. Sedgwick, Damages (8th Ed.) §§ 202, 204; *cf.* *Wolf* v. *Studebaker* (1870) 65 Pa. St. 459. The plaintiff, however, is not obliged to make more than reasonable exertions or expenditure. *Parker* v. *Meadows* (1887) 86 Tenn. 181. Instances in tort, *Loker* v. *Damon* (1839) 17 Pick. 284, and in contract, *Parsons* v. *Sutton* (1876) 66 N. Y. 92, 98, are familiar, and the rule applies equally to the law of carriers: e. g. a passenger cannot recover for injury from an arduous foot journey, if put off at the wrong station at night, unless accessible shelter was demanded and refused, *Ry. Co.* v. *Fleming* (Tenn. 1884) 14 Lea 128, 154, nor after failure of a train to stop, if a conveyance at reasonable expense was procurable. *Ry. Co.* v. *Birney* (1874) 71 Ill. 391; 3 Hutchinson, Carriers (3rd Ed.) § 1431. Thus it seems that the plaintiff in the principal case was damaged primarily by his own failure to act and only remotely by the defendant's wrongful conduct, *Gorden* v. *Butts* (N. J. 1807) 1 Pennington 334, and hence that the judgment for substantial damages should have been reversed.

DAMAGES—INTEREST—CONTRACTS.—The defendant bank was compelled to close its doors by the state superintendent of banking, and was placed in the hands of receivers. Later the bank was found to be solvent, and the receivers were discharged. *Held,* inasmuch as the closing was not the result of a voluntary action on the part of the bank, a depositor could not recover interest for the time of suspension without proving a demand. *Forschirm* v. *Mechanics' & Traders' Bank* (1910) 122 N. Y. Supp. 168. See Notes, p. 68.

DAMAGES—PATENTS—INFRINGEMENT.—On an accounting after a preliminary injunction in a suit in equity for infringement of a patent,

the master found that the defendant's infringing sales had netted him a profit of $7531 and at the same time inflicted $680 damages upon the plaintiff. The plaintiff's machine was the only one on the market which could do the work required. *Held,* the plaintiff could recover $7531. *Peerless Brick Mach. Co.* v. *Miracle Pressed Stone Co.* (1910) 181 Fed. 526. See Notes, p. 74.

EQUITY—PARTITION—COMPENSATION FOR IMPROVEMENTS.—One defendant in partition, being in possession of land belonging to the plaintiff and the co-defendants as tenants in common under color of title, made improvements thereon in good faith. *Held,* one judge dissenting, he should be allowed the value of the improvements out of the proceeds of the sale. *Lyons National Bank* v. *Shuler et al.* (N. Y. 1910) 92 N. E. 800.

While one who has improved the land of another generally can have no remedy, *Gregg* v. *Patterson* (Pa. 1844) 9 W. & S. 197, 209, where the improver believed he had title he can set off the value of the improvements up to the amount of mesne profits claimed by the owner. *Jackson* v. *Loomis* (N. Y. 1825) 4 Cow. 168; N. Y. Code Civ. Pro. § 1531. If the owner sues in equity, however, the maxim "He who seeks equity must do equity" is applied, Pomeroy, Eq. Jur. § 385, and he must fully compensate the defendant. *Mill* v. *Hill* (1852) 3 H. L. Cas. 828, 869; *Hawkins* v. *Brown* (1883) 80 Ky. 186. This rule has been extended to actions at law by statute in some jurisdictions. *Griswold* v. *Bragg* (1880) 48 Fed. 519. But the improver cannot recover in an independent suit, *Putnam* v. *Ritchie* (N. Y. 1837) 6 Paige 390, there being no equitable doctrine under which such a right exists. Story, Eq. Jur. § 799; *contra, Bright* v. *Boyd* (1841) 1 Story 478; (1843) 2 Story 605; Keener, Quasi-Contracts § 378. As, in New York, partition is an equitable action, *Weston* v. *Stoddard* (1893) 137 N. Y. 119, and an adverse claimant is a proper party defendant, *Satterlee* v. *Kobbe* (1903) 173 N. Y. 91, the defendant's right to compensation as against the plaintiff rests on sound equitable principles. But, although the maxim is applied against defendants seeking affirmative relief in equity, *Thomas* v. *Brownsville, etc. R. R. Co.* (1883) 109 U. S. 522; Phelps, Juridical Eq. § 254, where parties, like the co-defendants in the principal case, are brought into court against their will and have done nothing to invoke the assistance of equity, it is not apparent upon what theory they can be deprived of their legal right to recover the land without allowing for improvements.

EVIDENCE—BURDEN OF PROOF—PAYMENT IN CONTRACT ACTIONS.—In assumpsit to recover on an open account for services rendered by the plaintiff's testator, the declaration alleged a certain amount due and unpaid. The defendant put in a general denial. The plaintiff failed to establish non-payment. *Held,* one judge dissenting, the burden was on the plaintiff to show non-payment. *Pollak* v. *Winter* (Ala. 1910) 51 So. 998, 52 So. 829, 53 So. 339.

The decisions are in conflict on the question of the burden of proving payment or non-payment in contract actions. The declaration must allege the breach; *Lent* v. *N. Y. R. R.* (1892) 130 N. Y. 504; and since under the general issue the plaintiff must prove all the material allegations of his declaration, 1 Saunders, Pl. & Ev. 140; *Cochran* v. *Reich* (N. Y. 1895) 91 Hun 440, to some courts it appears illogical that the defendant must prove payment. *Conkling* v. *Weath-*

erwax (1895) 181 N. Y. 258. Yet where the defendant must specially plead payment, the opposite rule is obviously quite as illogical. *Conkling* v. *Weatherwax supra* (dissenting opinion). In assumpsit the plaintiff originally had to allege and prove the defendant's promise, the consideration, and the fraudulent breach. See 2 Harv. L. Rev. 1, 53. An exception was early recognized, however, in actions on express or implied contracts for the payment of money, the courts, probably influenced by the similarity of implied assumpsit to the old action of debt, *McKyring* v. *Bull* (1857) 16 N. Y. 297, 300, assuming that the defendant relying on payment must prove it. *Fits* v. *Freestone* (1675) 7 Mod. 210. It is not anomalous that the plaintiff must allege that which he need not prove, *Potter* v. *Deyo* (N. Y. 1838) 19 Wend. 361, and practical considerations demand that the defendant should prove payment, a fact peculiarly within his knowledge, *Wolffe* v. *Mall* (1878) 62 Ala. 24, the negative of which would usually be impossible of proof. The cases make no distinction as to actions upon an open account; *Shulman* v. *Copeland* (1873) 50 Ala. 81; and the principal case is therefore opposed to the weight of authority. *Baehr* v. *Buell* (1907) 133 Wis. 119.

FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP—RECEIVER AS ASSIGNEE.—The plaintiff, a citizen of Ohio, was appointed receiver by a court of that state, and as authorized by statute, brought suit in the federal court to enforce the statutory liability of the defendant stockholder, a citizen of Maryland. The defendant pleaded lack of jurisdiction because some of the creditors the plaintiff represented were also citizens of Maryland. *Held,* the court had jurisdiction, as it is the citizenship of the receiver, and not that of the creditors, which affords the test of jurisdiction. *Irvine* v. *Bankard* (C. C., D. Md. 1910) 181 Fed. 206.

Under the act of Congress of March 3, 1887, 24 St. at L. 552, in effect re-enacting a provision of the Judiciary Act of 1789, no federal court can entertain any suit upon a chose in action in favor of any assignee or subsequent holder unless the court might have taken jurisdiction had no assignment or transfer been made. While the act has been considered inapplicable to executors and administrators, *Childress* v. *Emory* (1823) 8 Wheat. 642, statutory assignees in insolvency selected by the creditors under order of the court have been held to be within the statute, although such assignment is purely by operation of law. *Sere* v. *Pitot* (1810) 6 Cranch 332. The doctrine of this case has been held applicable to receivers, *U. S. Nat. Bank* v. *M'Nair* (1893) 56 Fed. 323; but see *Paige* v. *Rochester* (1905) 137 Fed. 663, and on principle it is difficult to distinguish the cases. On the other hand, in cases where the applicability of the statute was not raised, it was decided that the citizenship of the receiver determined the question of jurisdiction; *Davis* v. *Gray* (1872) 16 Wall. 203; *Peper* v. *Rogers* (1904) 128 Fed. 987; and the reasons of policy for excepting executors and administrators would seem equally applicable to receivers. Assuming the receiver to be an assignee of the insolvent corporation, however, a different situation is presented where, as in the principal case, the receiver is enforcing, not the corporation's choses in action but the statutory rights of its creditors against the stockholders; and since the creditors were not deprived by the statute of their individual rights of action upon the appointment of a receiver, the latter, in enforcing in their favor the extra remedy pro-

vided by statute, was properly held their representative and not their assignee.

GIFTS—CAUSA MORTIS—REVOCATION AND SATISFACTION.—The deceased gave the plaintiff, *causa mortis*, £2000 in deposit notes. In each of two subsequent wills he later bequeathed her, *inter alia*, £2000. *Held*, the legacy neither revoked nor satisfied the gift. *Hudson* v. *Spencer* (1910) 103 L. T. Rep. 276.

Gifts *causa mortis* may be avoided (1) by the donor's escape from the danger contemplated; (2) by the death of the donee prior to that of the donor; (3) by the failure of the estate of the donor to meet his debts; (4) by a revocation on the part of the donor. Brantly, Pers. Prop. § 211. It has often been held that a subsequent will cannot revoke such a gift, since the will does not speak until by death the gift has become fixed. *Nicholas* v. *Adams* (Pa. 1836) 2 Whart. 17; *Hoehn* v. *Struttman* (1897) 71 Mo. App. 399; *contra, Jayne* v. *Murphy* (1888) 31 Ill. App. 28. But no resumption of possession, *Adams* v. *Atherton* (1901) 132 Cal. 164, nor communication to the donee, seem to be requisite for such revocation. *Bliss* v. *Fosdick* (N. Y. 1875) 86 Hun 162. Indeed, such a requirement would often prevent the donor's exercising his right to revoke, the gift being made in contemplation of approaching death; Brantly, Pers. Prop. § 204; Pomeroy, Eq. Jur. § 1146; and the above conclusion is further borne out by the fact that on the donor's recovery the gift is *ipso facto* void. See 3 Pomeroy, Eq. Jur. § 1146. Therefore a clear expression of the intent to revoke should be sufficient, see Pomeroy, Eq. Jur. § 1150, and such expression would apparently be no less unequivocal in a will reclaiming the same *res* by bequest to another, than elsewhere. The same reasoning, it would seem, should apply to a legacy in satisfaction of the gift, unless conditional on the donee's relinquishment thereof, for such a legacy would simply be a revocation and substitution. In the principal case, however, there could be no question on the evidence of either revocation or satisfaction, and the decision seems clearly correct.

HIGHWAYS—STREET RAILWAYS—DUTY TOWARDS OTHER VEHICLES.—One Schenker's wagon, which had been standing at the curb immediately behind the plaintiff's, started to turn out to pass the latter when the defendant's street car was about fifty feet away. The car, approaching rapidly and without warning, knocked it against the plaintiff's wagon. *Held*, the defendant was not liable as its right of way was paramount between blocks. *Stern* v. *Brooklyn Heights R. Co.* (1910) 124 N. Y. Supp. 1043.

Since a street railway receives its franchise for the accommodation of the public and since from its nature its cars cannot give and take the road, public convenience demands that other vehicles should yield a street car the right of way when overtaken and not unnecessarily impede its progress. *Ehrisman* v. *Harrisburg Ry. Co.* (1892) 150 Pa. St. 180; *N. Chi. Elect. Ry. Co.* v. *Peuser* (1901) 190 Ill. 67. To this extent only can the rights of street railways be said to be paramount, *Woodland* v. *North Jersey St. Ry. Co.* (1901) 66 N. J. L. 455, for where this superior necessity does not exist, as at street intersections, their rights are the same as those of other travellers. *Buhrens* v. *Dry Dock etc. R. R. Co.* (N. Y. 1889) 53 Hun 571. Hence their right of way between blocks is not exclusive, *Fleckenstein* v. *Dry Dock etc.*

R. R. Co. (1887) 105 N. Y. 655, but a member of the public may drive across or along their tracks where and when he choses, *Lawler* v. *Hartford St. Ry. Co.* (1899) 72 Conn. 74, even though it may necessitate a car's slacking its speed, *Lawson* v. *Met. St. R. Co.* (1899) 40 App. Div. 307; aff. 166 N. Y. 589, provided he does not unnecessarily block the way. *Adolph* v. *Central Park etc. R. R. Co.* (1875) 65 N. Y. 554. Nor is his failure in such event to stop, look, and listen, negligence as a matter of law, *Cincinnati St. Ry. Co.* v. *Whitcomb* (1895) 96 Fed. 915; *Lawson* v. *Met. St. R. Co. supra,* for one may presume that a car driver will exercise due care and give notice of his approach. *Indianapolis St. Ry. Co.* v. *Marschke* (1906) 166 Ind. 490. It would therefore appear from the facts reported that the court in the principal case erred in holding that the accident was due solely to Schenker's negligence and that the defendant was guilty of no breach of duty.

INSOLVENCY—CONFLICT OF LAWS—STATUTORY PREFERENCE.—After the commencement of insolvency proceedings in the jurisdiction in which the property and business of a corporation were entirely situated, a franchise tax was imposed in the state of organization under a statute entitling it to a preference. The franchise was in fact exercised thereafter. A decree in the insolvency proceedings allowing the claim as to the funds so situated was reversed, one judge dissenting, on the ground that the tax was an arbitrary imposition interfering with substantial rights of local creditors. *Franklin Trust Co.* v. *New Jersey* (C. C. A., 1st C. 1910) 181 Fed. 769. See Notes, p. 63.

LICENSES—REVOCABILITY—ESTOPPEL.—Pursuant to a license a ditch was dug at great expense through the licensor's land. *Held,* the licensor was estopped to revoke the license. *Shaw* v. *Proffitt* (Ore. 1910) 110 Pac. 1092. See Notes, p. 76.

LIMITATION OF ACTIONS—PART PAYMENT BY CO-SURETY—RIGHT TO CONTRIBUTION.—A surety who had made part payment before the debt was barred, paid the entire debt after the original period of limitation had elapsed and brought suit against his co-surety for contribution. *Held,* as such payment did not constitute a new point from which the statute would run against the co-surety, the plaintiff could not recover. *McLin* v. *Harvey* (Ga. 1910) 69 S. E. 123. See Notes, p. 70.

MARRIAGE—ANNULLMENT—MISREPRESENTATION AS TO CHASTITY.—A complaint in an action for annullment of marriage was dismissed as not stating a cause of action when it alleged that the defendant had fraudulently induced the plaintiff to marry her by representing herself to have been the wife of a man then deceased and her child to be legitimate, when in truth she had been his mistress and the child was illegitimate. *Held,* such facts constituted a cause of action. *Domschke* v. *Domschke* (N. Y. 1910) 138 App. Div. 454.

The courts are generally unwilling to set aside a marriage for fraud except when going to the essential elements of the relationship. *Glean* v. *Glean* (N. Y. 1902) 70 App. Div. 576. The English courts hold these elements to be the identity of the parties and permanent physical incapacity to consummate the marriage. *Moss* v. *Moss L. R.* [1897] P. 263. In this country the courts have been more liberal, especially where the fraud has been discovered before consummation. *Svenson* v. *Svenson* (1904) 178 N. Y. 54; *Carris* v. *Carris* (1873) 24 N. J. Eq.

516; 1 Bishop, Marriage and Divorce 166. But concealment of or voluntary misrepresentation as to prior unchastity are not deemed essential; *Shrady* v. *Logan* (1896) 40 N. Y. Supp. 1010; and such misrepresentation even when made in response to direct inquiries has been held insufficient. *Leavitt* v. *Leavitt* (1865) 13 Mich. 452; see *Fisk* v. *Fisk* (N. Y. 1896) 6 App. Div. 432. In jurisdictions regarding the contractual nature of marriage rather than the resultant status, a different rule should apply where the contract is secured by misrepresentation of a material fact. *di Lorenzo* v. *di Lorenzo* (1903) 174 N. Y. 467. In New York, fraud inducing the consent of either party is, by statute, made ground for annullment. Dom. Rel. Law § 10 (N. Y. Consol. Laws c. 14). While this has been properly construed to relate only to material fraud, *di Lorenzo* v. *di Lorenzo supra,* on principles of contract the fraud is material if, in its absence, the party deceived would not have entered into the marriage relation. 2 Parsons, Contracts (8th Ed.) 895. It is conceivable that by inquiry or force of circumstances prior chastity may be made a condition of the contract. Since upon demurrer every inference of fact should be indulged in favor of the complaint, the court in the principal case is correct in its view of the possible effect of fraud under such circumstances.

MASTER AND SERVANT—SAFE PLACE TO WORK—FOREMAN'S NEGLIGENCE. —The plaintiff, engaged in excavating on a steep hillside, was injured by a stone loosened through the negligence of his foreman while collecting fuel for a fire used in the work. *Held,* the foreman's act was a breach of the master's duty to furnish a safe place to work. *Campbell* v. *Jones* (Wash. 1910) 110 Pac. 1083.

The severity of the fellow servant rule has in different jurisdictions been mitigated by excluding from the class "fellow servants" those of superior rank, *Railroad* v. *Keary* (1854) 3 Ohio St. 201, those in charge of distinct departments, *Railroad* v. *Baugh* (1892) 149 U. S. 368, or those performing at the time of the injury a non-delegable duty of the master. *Crispin* v. *Babbitt* (1880) 81 N. Y. 516. The principal case is an erroneous application of this last exception. The exactions of the employer's non-delegable duty to supply a reasonably safe place to work, vary with the nature of the place, *Walling* v. *Construction Co.* (1893) 41 S. C. 388, and the method of the work, see *Bradley* v. *Railway* (1896) 138 Mo. 293, and, although this duty is, according to the better view, always present, *Madden* v. *Railway* (1884) 32 Minn. 303; *contra, Finalyson* v. *Milling Co.* (1895) 67 Fed. 507, the demands of ordinary care, greatest in the case of completed premises, reach a minimum in situations where as in the prinicpal case the progress of the work constantly changes the character of the place, *Construction Co.* v. *Frank* (1908) 158 Fed. 964, or where the work consists in the removal of dangerous conditions. *Maloney* v. *Railroad* (1907) 39 Colo. 384. In such cases, the very nature of the employment, because of its inherent dangers, admits of little affirmative effort to diminish its risks, see *Spinning Co.* v. *Achord* (1889) 84 Ga. 14, so that having guarded against probable dangers, *Durst* v. *Steel Co.* (1896) 173 Pa. St. 162, the master is subject only to the negative duty to refrain from increasing the natural hazards of the place. *Gibson* v. *Bridge Co.* (1905) 112 Mo. App. 594. The evidence in the principal case shows no breach of this duty. On the contrary it seems clear that the injury was due merely to the negligent execution of a detail of the general work, which, by the rule applied, characterizes the foreman as a fellow

servant. *Loughlin* v. *State* (1887) 105 N. Y. 159; *Perry* v. *Rogers* (1898) 157 N. Y. 251.

MORTGAGES — DOWER — PURCHASE MONEY MORTGAGE.— The plaintiff claimed as her dower share in the surplus remaining after the foreclosure of a purchase money mortgage one third of the total value of the premises. *Held,* she was entitled only to one third of the surplus. *In re Hayes* (C. C. A., 6th C. 1910) 181 Fed. 674. See Notes, p. 66.

MORTGAGES—FORECLOSURE OF PURCHASE MONEY MORTGAGE—DEFECT OF TITLE AS DEFENSE.—The owner of a life estate attempted to convey in fee simple by warranty deed to the defendant, and took back a purchase money mortgage. After the termination of the life estate the remaindermen, who had acquired the mortgage by descent, sought to foreclose. *Held,* the defect in the title purchased by the mortgagor was no defense. *Nielson* v. *Cent. Neb. Land & Inv. Co.* (Neb. 1910) 127 N. W. 897.

A defect in title is no defense to the foreclosure of a purchase money mortgage, *Abbott* v. *Allen* (1817) 2 Johns. Ch. 519, at least in the absence of eviction of the vendee under a paramount title, fraud on the part of the vendor or his insolvency. *Randall* v. *Bourgordez* (1887) 23 Fla. 264. In the case of eviction the mortgagor's sole remedy is to recover damages for the breach of his real covenants, which however may be assessed in the same action under code practice, *Akerly* v. *Vilas* (1866) 24 Wis. 89, 110, and apparently also at common law; *Coster* v. *Mfg. Co.* (1841) 2 N. J. Eq. 467; and where the deed is without covenants a purchaser is remediless either at law, *Frost* v. *Raymond* (N. Y. 1804) 2 Caines 188, or in equity. *Conwell* v. *Clifford* (1873) 45 Ind. 390. The former explanation of the rule, that the mortgagor as quasi-tenant of the mortgagee could not dispute his title, *Peck* v. *Nelson* (1853) 26 Vt. 13, has been rejected in favor of the broader principle that a purchaser ought not have the use and enjoyment and yet resist payment of the purchase price. *Bush* v. *White* (1884) 85 Mo. 339, 357; *Sebrell* v. *Hughes* (1880) 72 Ind. 186. Thus, the rule is deemed equally applicable to a suit on an unsecured note for the purchase money. *Barkhamstead* v. *Case* (1825) 5 Conn. 528. The fact that in the principal case the holder of the mortgage also had the paramount legal title should not affect the result. On the contrary, by seeking to enforce their mortgage lien the plaintiffs seemingly adopted the unauthorized alienation and perfected the title of the mortgagor, *Goodman* v. *Winters* (1879) 64 Ala. 410, 434, whose position is therefore better than where the life estate remains undetermined, and where, nevertheless, the orthodox rule is followed. *Marsh* v. *Thompson* (1885) 102 Ind. 272. The decision is therefore unquestionably correct.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.—The defendant's motorman was driving at a negligent rate up to the point where he first could see the plaintiff negligently driving towards the tracks, whereupon he tried in vain to stop in time. *Held,* under the "last clear chance" doctrine the defendant was liable for the motorman's negligence before he could see the danger. *Williams* v. *Kansas City Elect. R. Co.* (Mo. 1910) 131 S. W. 115.

According to the doctrine of "last clear chance" a plaintiff whose negligence was an essential element in the injury may nevertheless recover if after the culmination of his negligence the defendant negli-

gently failed to avoid the resultant danger when actually aware of its existence. *Davies* v. *Mann* (1842) 10 M. & W. 546; *Sweeney* v. *N. Y. Steam Co.* (1889) 6 N. Y. Supp. 528. In many jurisdictions the doctrine is extended to cases where the defendant could have discovered the peril seasonably by exercising due care. *Pittsburg & St. Louis R. Co.* v. *Lewis* (Ky. 1896) 38 S. W. 482; *White* v. *Wabash Western R. Co.* (1889) 34 Mo. App. 57. While regarded by some authorities as an exception to the rule of contributory negligence, *Tanner's Executor* v. *Louisville & N. R. Co.* (1877) 60 Ala. 621; *Hanlon* v. *Mo. Pac. R. Co.* (1891) 104 Mo. 381, this doctrine is properly deducible from the legal theory of causation. Pollock, Torts (8th Ed.) 468. Thus, as one is liable only for the proximate consequences of his acts, *Milwaukee & St. Paul R.* v. *Kellogg* (1876) 94 U. S. 469, so a plaintiff's negligence will not defeat his action unless it was a proximate cause of his injury; *Gray* v. *Cape Fear etc. R. Co.* (1888) 99 N. C. 298; and where the effects of the plaintiff's negligence might have been averted by the exercise of due care on the defendant's part, the plaintiff's negligence is not deemed a proximate cause, having been superseded by a subsequent intervening cause. Pollock, Torts (8th Ed.) 468; *Richmond Traction Co.* v. *Martin's Adm'r* (1903) 102 Va. 209; *O'Brien* v. *Mc Glinchy* (1898) 68 Me. 552. But where, as in the principal case, the defendant's negligence did not lie in the failure to avert the result of the plaintiff's, the latter's would seem to be a proximate cause. The extension of the doctrine to a case where the defendant could not avoid the danger upon discovering it seasonably is therefore unwarranted.

QUASI-CONTRACTS—SERVICE RENDERED AGAINST DEFENDANT'S WISH.—The Mexican steamer Olympia grounded on a rock. The master rejected assistance, yielding only when the master of a pilot boat, assisted by his uniform, falsely persuaded him that as "Commodore of the Port" he must be obeyed. The pilot's men, ignorant of his deceit, jettisoned the cargo and floated the vessel. *Held,* no action for salvage lay, but the men were entitled to a *quantum meruit. The Olympia* (D. C., S. D. Fla. 1909) 181 Fed. 187.

As the court implied no promise in fact, the question is one of quasi-contract. In general no action lies to recover for work done where the defendant protested against the service, *Whiting* v. *Sullivan* (1810) 7 Mass. 107; *Earle* v. *Colburn* (1881) 130 Mass. 596, or where service is rendered without the defendant's knowledge and consent, *Dunbar* v. *Williams* (N. Y. 1813) 10 Johns. 249, unless performed in the discharge of a duty imposed on the plaintiff by the defendant's conduct. *Great Northern R. Co.* v. *Swaffield* (1874) L. R. 9 Exch. 132. Even where the service performed is an act enjoined on the defendant as a legal obligation, there can be no recovery if it was rendered officiously. Keener, Quasi-Contracts 530; *Quin* v. *Hill* (N. Y. 1886) 4 Dem. 69. In the principal case the plaintiffs were under no legal duty, and the case is distinguishable solely by the fact of the plaintiffs' partial reliance upon the defendant's apparent assent. But the fraud, amounting almost to duress, which procured this assent, would seem to render it nugatory, so that the plaintiffs, although innocent, were apparently in no better position than one who sought to recover on a *quantum meruit* for services rendered in reliance on an agent's unauthorized order; *Davis* v. *School District* (1884) 24 Me. 349; for in either event the true cause of the plaintiff's loss was the misrepresenta-

tion of a third person. The principal case therefore seems to contravene the established rule that one cannot force himself upon another as creditor. Keener, Quasi-Contracts 341; *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28. And as the defendant was a blameless instrument of the wrong perpetrated by the pilot, the justice of a recovery seems at least doubtful.

QUASI-CONTRACTS—WAGERING CONTRACT—RECOVERY OF STAKE FROM STAKEHOLDER.—The plaintiff bet on a horse race and deposited his stake with the defendant, a stakeholder. After the bet was lost, but before the deposit was paid, the defendant was notified to return it to the plaintiff, but refused to do so. *Held,* the plaintiff could recover. *Ward* v. *Holliday* (Neb. 1910) 127 N. W. 882.

While at common law the winner of a bet cannot recover the stake, if the loser has voluntarily paid the bet he cannot compel the winner to repay him. *Howson* v. *Hancock* (1800) 8 T. R. 575. A distinction, however, has been made as to actions against a stakeholder; and it was established in *Cotton* v. *Thurland* (1793) 5 T. R. 405, that the loser might recover against the stakeholder upon notice before payment, although the event had been decided. This distinction is justifiable on the ground that although the payment is voluntary in both cases, payment to a stakeholder is not meant to transfer any interest to him. The English rule, affirmed in *Vischer* v. *Yates* (1814) 11 Johns. 23, was disavowed in *Yates* v. *Foot* (1814) 12 Johns. 1, on the ground that upon the happening of the event bet on, the contract as to the loser is fully executed, and the court will not interfere. This rule, in the absence of statute, prevails in some states, *Johnson* v. *Russel* (1869) 37 Cal. 670, but the principal case is in line with the weight of authority, which deems public policy best subserved by allowing a recovery, in spite of the gross dishonesty practised. Since the doctrine of *pari delicto,* in decisions based wholly on that ground, seems but another name for public policy, see *Holman* v. *Johnson* (1775) Cowp. 341, 343, it cannot be here invoked to defeat a recovery by the plaintiff. Recovery is only allowed when the plaintiff has expressly repudiated the illegal contract, *Trenery* v. *Goudie* (1898) 106 Ga. 693, and so is in no sense an affirmance of that contract. *Alford* v. *Burke* (1857) 21 Ga. 46. If the stakeholder has paid over the money without notice, there is no recovery, *Bates* v. *Lancaster* (Tenn. 1849) 10 Hump. 134, the bettor being deemed to have made a voluntary payment through his agent, the stakeholder.

SPECIFIC PERFORMANCE—INSTALLMENT CONTRACT—WAIVER OF CONDITIONS AS TO TIME.—A contract for the sale of land provided for payment in monthly installments, sixty days' default to justify rescission and forfeiture; and time was of the essence. The vendor accepted several installments long overdue; and three years after the last payment, without demand or tender, gave notice of rescission to the purchaser, who at once tendered payment in full and upon refusal sued for specific performance. *Held,* a demurrer to the complaint stating these facts was properly overruled. *Boone* v. *Templeman* (Cal. 1910) 110 Pac. 947.

In the absence of conduct on the part of the vendor amounting to waiver, equity will not assist a vendee in default. *Benedict* v. *Lynch* (1815) 1 Johns. Ch. 369. Where time is of the essence, however, a default is waived when the other party treats the contract as still in force, *Seton* v. *Slade* (1802) 7 Ves. 265, as by receiving further install-

ments, *Grigg* v. *Landis* (1870) 21 N. J. Eq. 494, or by mere delay in exercising the right of rescission. *Pier* v. *Lee* (1901) 14 S. D. 600. Although default as to each installment constitutes a new breach and gives a new right of rescission, *Hunter* v. *Daniel* (1845) 4 Hare 420, 432, the waiver operating only as to previous defaults, *Phelps* v. *Ill. Cent. R. R. Co.* (1872) 63 Ill. 468, to take advantage of future delays it would seem that the vendor must give the vendee notice of his intention so to do, *Harris* v. *Troup* (N. Y. 1840) 8 Paige 323, as by repeated demands for payment. See *Stow* v. *Russel* (1864) 36 Ill. 18. In the principal case the vendor seems to have taken no steps to revive the condition as to promptness. Further, the vendee's prompt assertion of his right relieves him of any suspicion of having acquiesced in the rescission, see *Guest* v. *Homphrey* (1801) 5 Ves. 818, and the demurrer to his complaint was therefore properly overruled. Where a delay would make it inequitable to enforce the contract, the defaulting party cannot insist on performance; *Denniston* v. *Coquillard* (1851) 5 McLean 253; but delay in payment is ordinarily presumed capable of being compensated, *Decamp* v. *Feay* (Pa. 1819) 5 S. & R. 323, and the determination of this question was properly left until the hearing.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE.—The plaintiff conveyed certain lands, taking as consideration a promissory note, and remained in possession. Later the grantees agreed orally to reconvey and the plaintiff to cancel the note, which he did. *Held*, the plaintiff having irretrievably changed his position was entitled to specific performance. *McGuire* v. *Murray* (Me. 1910) 77 Atl. 692.

Specific performance of parol contracts performed in part is granted on two distinct doctrines. According to one, since the contract was enforced because of equities arising from acts done in reliance on the contract, *Madison* v. *Alderson* (1883) L. R. 8 A. C. 467, performance is decreed when, and only when, the acts relied on are unequivocal evidence of an agreement, the terms of which may then be proven by parol. *Ungley* v. *Ungley* (1877) L. R. 5 Ch. Div. 887; *Gunter* v. *Halsey* (1739) Amb. 586. Thus payment is not sufficient, *Frame* v. *Dawson* (1807) 14 Ves. 386, though formerly so considered; *Lacon* v. *Mertins* (1743) 3 Atk. 1; nor is continuance in possession, *Brennan* v. *Boulton* (1842) 2 Dr. & W. 349, at least unless repairs have been made. *Mundy* v. *Joliffe* (1839) 5 My. & Cr. 167. Under this doctrine the promise is enforced even where other adequate compensation is possible, as where the plaintiff has merely taken possession. *Earl of Aylesford's Case* (1714) 2 Str. 783. On the other hand several courts in this country decree specific performance only where the promisee has irretrievably changed his position. *Burns* v. *Daggett* (1886) 141 Mass. 368. Since the justification for disregarding the Statute is to prevent fraudulent injury to the plaintiff by its means, Browne, Statute of Frauds § 448, the denial of equitable relief where other compensation is adequate seems proper. In spite of intimations suggesting the test of unequivocal acts, *Burns* v. *Daggett supra*, jurisdictions adopting this view seem to disregard the restriction imposed by the English theory, *Gross* v. *Milligan* (1900) 176 Mass. 566, though some inconsistently follow the English courts in giving relief where possession is taken. *Goodwin* v. *Smith* (1897) 89 Me. 506. In view of the sound reasons supporting both restrictions, their combination would seem preferable to the exclu-

sive adoption of either. The principal case, however, correctly applies the later American doctrine.

WILLS—LEGACIES—ADEMPTION.—During the minority of a testator his conservator withdrew and mingled with the general assets the interest of a trust fund which was the subject of a specific bequest. *Held,* there was no ademption, as the testator had not evinced an intention to adeem. *Wilmerton* v. *Wilmerton* (1910) 176 Fed. 896. See Notes, p. 72.

ERRATUM.

Vol. 10 p. 773 (Dec., 1910):—EVIDENCE—PAROL EVIDENCE RULE—PATENT AND LATENT AMBIGUITIES.—In order to bring out that the ambiguity in the principal case was patent, the first sentence should read "A written contract entered into by a railroad company and the plaintiff with the defendant provided merely that the defendant would pay interest on certain stock," instead of "would pay interest to the railroad."